for The Defense

The Training Newsletter for the Maricopa County Public Defender's Office

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The Maricopa County Public Defender's Office Comments on the Report of the Commission on Juvenile Justice

by Helene Abrams

INTRODUCTION:

No more laudable goal exists than to prevent children from entering the juvenile justice system. The Commission on Juvenile Justice offers many suggestions which should be considered. Many long hours were spent by the Commission members addressing juvenile justice problems. They are to be commended for their tireless efforts. Special thanks are extended to Judge Noel Fidel, Vice-Chair of the Commission, who took the time to sit as a Juvenile Court judge and actually see what happens in the "trenches."

The following comments correspond to the chapters in the Commission's Report.

CHAPTER ONE:

At-Risk Youth

The Juvenile Court and the public will be served if children who are at-risk to commit delinquent or incorrigible offenses can be identified. It should not surprise anyone that many public defender clients come from an impoverished environment where one parent is struggling to support numerous children. These children are exposed to drug use and violence on a daily basis. They are often victims of physical, emotional and sexual abuse. Little or no value is placed on education. A value system is lacking, and actions without consideration of consequences become the norm.

Developing a model that will identify those in need at the earliest possible age will benefit all. The Maricopa County Public Defender's Office strongly supports a prevention program for those youth identified as at-risk.

Minority Youth

Awareness of cultural differences assists decision-makers in the treatment of minority youth. Dispositional alternatives sensitive to and able to address cultural issues should be developed and used. A long-range plan for minority youth is encouraged by this Office.

CHAPTER TWO:

First Offenders and Minor Offenders

Assessment criteria developed to determine those at risk of continued involvement in delinquent and incorrigible activity will enable the community to short-circuit children destined to remain in the juvenile justice system. Addressing these concerns through reintroduction of the interagency case management process should allow specific treatment goals and enable the system to use the most appropriate agency to achieve those goals. Expansion of the JOLTS system to include information from other state agencies will provide access to information which is now unavailable and will prevent duplicative services.

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CHAPTER THREE:

Juveniles Involved in the Juvenile Justice System

Parents and juveniles, especially those who are involved in the juvenile justice system for the first time, are bewildered about the process, terminology and procedures. A videotape available to participants before an advisory hearing and simplification of forms will assist in demystifying the process.

It should not surprise anyone that many public defender clients come from an impoverished environment where one parent is struggling to support numerous children. These children are exposed to drug use and violence on a daily basis.

A standardized training program for field probation officers along with mandated reduced caseload size will assure that probation officers understand their role and have the time to work with those over whom they have control.

Because many incorrigible clients must stay detained for long periods of time, an amendment to Rule 3, Rules of Juvenile Court, to define the purpose of detention is recommended. The amendment would inform judicial officers of the proper use of detention and would reduce the commingling of serious and less serious offenders. Because education must be provided to children detained, a state-funded, comprehensive educational program would assure opportunity for schooling.

Children should not have handguns. Unfettered access to guns leads to needless and tragic deaths. Changes in the law to reduce the likelihood of these tragedies are strongly supported.

FOR THE DEFENSE

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Increased involvement by parents in the treatment of their children will result in a consolidated effort toward rehabilitation. Many parents, unfortunately, believe that the juvenile justice system can "fix" their children without their help. Only with the parents' assistance and encouragement can change happen. We support greater participation by parents in the treatment process. When imposing an affirmative duty to supervise and control children, it should be remembered that some parents try to supervise but are unsuccessful. Children are individuals with their own thoughts and ideas, who may be outside of their parent's control despite a substantial effort.

The total lack of services for undocumented immigrant youth creates inequities of constitutional importance. Many undocumented children remain detained until they are deported or are transferred into the adult system because of the absence of resources. This serious problem should be addressed immediately.

The juvenile system cannot solve all the problems of youth. Active community involvement is necessary. Community-based services are essential to assist the juvenile and families, to provide alternatives to institutionalization for sex offenders, to provide programs for female youth, and to provide vocational education and alternatives with the cooperation of school and businesses. Continued treatment should be available until the juvenile's 21st birthday to complete the rehabilitative process and prevent unnecessary transfers of juveniles into the adult system where, currently, services are virtually nonexistent.

"Truth in plea bargaining" is a noble desire, but many juveniles are unable or unwilling to provide the necessary legally required factual basis. The result will be many unnecessary adjudication hearings because a factual basis can not be established by others more familiar with the facts likely to be proven at trial. It is doubtful that the Department of Youth Treatment and Rehabilitation will ever see the "full factual history" of the offense unless a transcript of the plea proceeding is provided to them. That is an expensive proposition. The "full factual history," at least according to the police reports, is already provided to ADYTR in the dispositional report of the juvenile probation officer. The benefits of the current system outweigh any perceived benefit which might be realized with a change in the current process.

Confidentiality of juvenile records must be maintained to insure full disclosure and cooperation of the participants. Understanding of the juvenile court system can be attained by providing basic information to those interested without opening the courts to the public and press. Information sharing among agencies previously discussed will prevent duplicative services.

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CHAPTER FOUR:

Serious, Chronic and Violent Offenders

What to do for serious, chronic and violent offenders has always been the most troublesome question for the juvenile courts. There is a definite need to address the problems of these children to prevent victimization of others. Early prevention and assessment of at-risk children could eliminate future serious offenders.

Many parents, unfortunately, believe that the juvenile justice system can "fix" their children without their help. Only with the parents' assistance and encouragement can change happen.

Those currently in need of services who are characterized as serious, chronic or violent offenders are either placed at ADYTR or transferred to the adult system. The juvenile detention centers are not equipped to hold or treat these youths. When wards of ADYTR are apprehended, they should be taken directly to ADYTR to avoid commingling with minimum security youth.

ADYTR placement should be reserved only for those offenders who require secure care. The requirements imposed by the *Johnson v. Church Consent Decree* should be fully funded and implemented immediately. A successful program should include individualized treatment and reintegration services.

Confidentiality of juvenile records must be maintained to insure full disclosure and cooperation of the participants. Understanding of the juvenile court system can be attained by providing basic information to those interested without opening the courts to the public and press. Information sharing among agencies previously discussed will prevent duplicative services.

The recommendation for a transfer diversion program has already been the subject of discussion between the public defender's office and Judge Noel Fidel. Our concerns about transfer diversion include:

a) that the juvenile court judges not replace the option of not transferring a juvenile with transfer diversion, i.e., that transfer diversion become a third option along with transfer or not transfer depending on the individual case,

b) and that there be a real benefit to the juvenile who voluntarily participates and completes the diversion program.

The public defender office cannot, however, support the "once transferred and convicted, always transferred policy" or the rule change and statutory amendmentwhich would authorize presumptive transfer. The constitutionality of the once transferred rule is questionable.

The proposal distributed by Judge Fidel allowed judicial discretion to transfer a juvenile who did everything they were ordered to do. Not many juveniles will agree to participate if they cannot be assured that they will not be transferred if they fully cooperate in the diversion program.

"Streamlining" transfer is essentially an elimination of the probable cause hearing currently required in the adult system to initiate a case. This office does not oppose the proposed change to Rule 14(d), Rules of Procedure for Juvenile Court, as long as it is adopted *exactly* as it is set forth in the Commission Report, and that the procedure for motions for redetermination of probable cause and providing transcripts be maintained.

The public defender office cannot, however, support the "*once transferred and convicted, always transferred policy*" or the rule change and statutory amendment which would authorize presumptive transfer. The constitutionality of the once transferred rule is questionable. A decision to transfer a juvenile should always be based on a *current* assessment of the Rule 14(c) criteria and should be individualized on each case. Many juveniles are transferred simply because of the seriousness of the offense allegedly committed. Some of these children may commit a very minor offense after conviction on the charge they were originally transferred on. Clogging the adult system with these minors' offenses will benefit no one. The adult system is also overburdened and underfunded.

A procedural question also exists with this proposal. A juvenile who is transferred who then commits other offenses should be charged immediately so that the greatest amount of time is left in the juvenile system for rehabilitation. County attorneys should not be able to "*hold*" cases on an already transferred juvenile, wait for conviction on the first transferred charge, and then file the "held" cases so that the juvenile would be transferred on the new cases, too. The prosecution needs to allow the juvenile the opportunity to argue that enough time remains before his/her 18th birthday to provide for rehabilitation on new charges.

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It should also be remembered that a juvenile convicted in the adult system is likely to be placed on probation. Any new offenses committed while on probation will result in a probation revocation proceeding and possibly prison.

Presumptive transfer, which is recommended over automatic transfer or scrapping the entire system, presents some concerns for this office. As the Commission accurately noted, the juveniles who would be considered for presumptive transfer are few in number. Most of the juveniles in this category are transferred. Those who are not are likely presenting those unusual circumstances for which transfer is inappropriate. Presumptive transfer shifts the burden from the state who must establish the Rule 14(c) criteria to the juvenile who must "prove" he should not be transferred.

This office believes that the discretionary system currently used results in the transfer of those juveniles who should be transferred and the retention of those amenable to treatment. We are also concerned that the age of a juvenile will go down and the offenses will become more numerous if we arbitrarily select ages and offenses for presumptive transfer.

The Commission points out that because most juveniles who commit dangerous offenses are transferred, "it is marginally relevant to public safety at best whether the transfer decision remains purely discretionary or becomes, in part, automatic or presumptive." We agree. Those who should be transferred, are transferred. The courts are properly exercising the discretion granted to them in most cases. A system of presumptive transfer requires the juvenile to prove amenability and requires the court to support non-transfer with reasons presumably reviewable if the state chose to appeal.

This office believes that the discretionary system currently used results in the transfer of those juveniles who should be transferred and the retention of those amenable to treatment. We are also concerned that the age of a juvenile will go down and the offenses will become more numerous if we arbitrarily select ages and offenses for presumptive transfer.

Programs for transferred juveniles are virtually non-existent. They no longer are under the jurisdiction of the juvenile court where services are provided, and they are not yet adults so they cannot participate in adult programs. Without programs, these transferred juveniles will recidivate. One program which needs to be considered is the Youthful Offender Program, which will provide services for juveniles transferred who meet the eligibility criteria.

CHAPTERS FIVE AND SIX:

Fund and Implementation

The Commission stresses, on more than one occasion, the necessity of adequate funding to assess and implement the changes it suggests. Alternate funding sources should be explored as well as encouraging the legislature to appropriate the funds needed to implement changes. The juvenile court should never be in a situation where a major part of the rehabilitative process cannot be used because of a lack of adequate funding. Residential treatment programs have been eliminated as a treatment option for five months because of lack of funds.

CONCLUSION:

Many of the recommendations of the Commission should be applauded. They are innovative, creative and demonstrate a commitment to children. While some suggestions are problematic for this office, i.e., "once transferred," and presumptive transfer, we wish to commend the Commission members for their hard work and dedication to change which will benefit all of us.

Editor's Note: The comments of our office have been submitted to the Arizona State Bar, shared with all other public defender offices, and with other interested parties. ^

PRACTICE TIPS

"All people, rich or poor, have an absolute right to justice and equality before the law."

After missing a few issues of *for the Defense* "Practice Tips" is back. Here are some ideas that caught "Practice Tips'" eye.

Presentence Urine Testing. In *Portillo v. U.S.*, a 9th Cir. Federal Court of Appeals case, it was held that a presentence urine test violated the fourth amendment. In this case Portillo pled guilty to theft charges. The district court ordered him as part of the presentence investigation to submit to a urine test. His federal public defenders sought a stay to file a petition for mandamus.

In a case of first impression, although the court applied the so-called "special needs" exception to the warrant requirement, there was no showing that Portillo's crime bore any relation to drug usage. Plus, the test was routinely ordered and therefore no exigency existed.

This case certainly may have some value for any urine tests ordered for clients by state courts. It may also, however, be applied to other tests ordered by probation officers if unrelated to the offense, and may have some value for practitioners challenging HIV testing of clients under A.R.S. 13-1415.

A copy of the *Portillo* decision is available from the Training Division.

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Recording Confessions. Although a bill (SB 1493) is winding its way through the legislature that would require sound recordings of custodial interrogations of suspects, its passage is opposed by law enforcement and county attorneys. Our office, however, was instrumental in getting the bill out of the senate judiciary committee and provided technical assistance to its sponsor (we also testified in support of the bill).

Practitioners, however, should be aware of two items that may be used in cross-examination of case agents in confession cases. First, the U.S. Justice Department has published a research brief indicating that of the police departments that have gone to tape- or video-recording, video-recording is now favored. Several large metropolitan police forces have gone to taping of virtually all suspects if there is a custodial interrogation in a place of detention. Additionally, the justice report systematically debunks all of law enforcement concerns. This report, available from the Training Division, should be sent to any case agent in a confession case with a letter requesting him or her to read it. It then becomes fertile ground for cross-examination as to why the confession or inculpatory statements were not recorded.

Second, the 1985 case of *Stephan v. State*, 711 P.2d 1156 (Alaska), is an excellent resource for explaining the benefits of tape-recorded statements. Alaska has the so-called *Mallot Rule*, based on a case there that requires law enforcement, whenever feasible, to sound-record confessions. In *Stephan,* the Alaska Supreme Court threw out a confession for failure to sound-record based upon the due process clause of the Alaska Constitution. Practitioners may also want to contact public defender offices in Texas for information on their video-recording procedures. Texas, by statute, requires custodial interrogations to be video-recorded.

Lastly, the Uniform Rules of Criminal Procedure also require sound-recording. Rule 242(b) provides that: *If the individual in any manner expresses a desire to consult with a lawyer or for questioning to stop, questioning must stop. The informing of rights, any waiver thereof, and any questioning must be recorded upon a sound recording device whenever feasible or if questioning occurs at a place of detention.* If legislation fails this session, look for the criminal defense bar to carry the fight to the Criminal Rules Committee.

Accommodating Hearing Persons for the Defense has previously covered the special problems and statutory provisions relating to deaf and hard-of-hearing persons in making statements to law enforcement. However, one area newly highlighted in an upcoming law review article will be that deaf and hard-of-hearing persons desire to accommodate those gifted with hearing. In other words, an expert may be able to help you show that the statement is involuntary for psychological reasons.

Jamie McAlister, an associate at Meyer, Hendricks, Victor, Osborn, & Maledon has just written "*Deaf And Hard-Of-Hearing Criminal Defendants: How You Gonna Get Justice If You Can't Talk To The Judge?*" The following excerpt illustrates one of the article's many points:

"Deaf and hard-of-hearing persons instinctively accommodate hearing persons. This presents substantial problems when a defendant is required to respond, such as when confessions are sought to be admitted or a guilty plea entered. In such situations, waiver questions inevitably arise. A waiver of constitutional rights is effective only when made knowingly, voluntarily, and intelligently. Problems surface when a trial court confines its inquiry to mostly 'yes/no' questions to elicit the defendant's understanding of the right she waives and to determine whether the waiver was constitutional. A colloquy in which a defendant answers only 'yes/no' questions is generally insufficient upon which to find a competent waiver of constitutional rights . . . .

When 'yes/no' questions are used with deaf and hard-of-hearing persons, waiver problems are substantially magnified. The deaf community is an isolated, singular community that has developed skills concerned with survival in a hearing world. The driving force behind these survival skills is the fact that hearing individuals dominate deaf history."

If practitioners have a deaf or hard-of-hearing client who has been involved in giving statements to the police, Jamie McAlister should be contacted about voluntariness and *Miranda* issues.

The Plain Statement Rule. Okay, I'll try this again. You'll recall that "Practice Tips" continually nags about filing motions that are based upon state and federal grounds. Well, of course, it's not that simple. You'll recall that in *Michigan v. Long*, 463 U.S. 1032 (1981), the Supreme Court erected the "plain statement rule." Under this rule, a state court must: "Make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the Court has reached."

"If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not understate to review the decision." *Michigan v. Long, supra.*

If a state court asserts that its decision rests on state grounds and federal grounds, the U.S. Supreme Court will find jurisdiction by claiming that the state decision was really entirely federal. *See, e.g., Montana v. Jackson,* 460 U.S. 1029 (1983).

Practitioners need to be careful that the state cases being cited to support a state constitutional argument do not all refer *only to the federal constitution.* If there is no prior case law which explicitly refers to the respective state constitutional provision, then it becomes especially important for defense counsel to look back to the state constitutional provision (even including some historical background).

The Supreme Court has recognized that the failure of a state court to use analysis abiding by the plain statement rule has it deciding issues that would otherwise not be in its domain.

Caveat. Hence, remember that defense counsel needs to attempt to raise state and federal constitutional arguments for appeal and habeas review. In other words, there is a real danger in not raising both and as much as possible having arguments hinging on both. Remember in *McClesky v. Zant*, 111 S.Ct. 1454 (1991), the Supreme Court has in effect ruled that the failure to raise a claim at the state court level may prevent a petitioner from having it considered on habeas review. Thus, an argument that one's right to a remedy rests on independent and adequate state's grounds could jeopardize later recourse to a federal constitutional argument. ^

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State v. Schackart,
144 Ariz. Adv. Rep. 11 (Sup. Ct. 7/22/93)
Trial Judge Michael J. Brown

Defendant was convicted of felony murder, sexual assault and kidnapping. Defendant claims that he is entitled to a new trial because the transcripts of his trial and sentencing are useless. The trial court reconstructed the record and found that the trial transcripts fairly and accurately reflected the proceedings below. While there are mistakes, the vast majority of these mistakes are typographical. While the record is not perfect, it is, however, of sufficient completeness for adequate consideration of the errors assigned and is more than adequate to permit a full review for fundamental error. While the trial transcripts are sufficient, the sentencing transcript is not. Because the transcript is inadequate to enable a proper review of the defendant's death sentence, the matter is remanded for a new sentence hearing.

Defendant contends that there are several errors concerning his lack of intent to kill. Because the jury found defendant guilty of felony murder, however, such error would have no bearing in his conviction. These issues are only relevant as they affect his sentence under *Tison v. Arizona*, 481 U.S. 137 (1987).

The defendant planned to call a particular psychiatrist to testify regarding his mental state at the time of the killing. The state moved for Rule 11 proceedings. The motion was granted. Of the two experts appointed, the psychiatrist who was listed as a defense witness was appointed. Defendant argues that the court did not follow the requirements of Rule 11 when it appointed this same psychiatrist. Rule 11 provides that each party may provide a list of three experts and the court shall appoint one expert from each list. If a party does not submit a list, the court shall appoint an expert of its own choosing. The defendant did not provide a list of experts and waived his right to narrow the selection process. The fact that this doctor had already been retained by defense counsel did not disqualify him from also being appointed under Rule 11.

Defendant claims that ordering him to submit to a mental examination violates his rights against self-incrimination. A defendant who places his mental condition in issue and gives notice of an intent to rely on psychiatric testimony has opened the door to an examination by an appointed expert.

Defendant argues that the trial court erred in denying his request to have counsel present during the mental examination. A defendant has no constitutional right to the presence of counsel during a mental examination. If the defense wishes to challenge the manner in which a mental examination has been conducted, or an expert's conclusions, this can be done on cross-examination or during the testimony of its own witnesses. The trial court did not err by refusing defendant's request to have counsel present during the expert's examination.

Defendant's expert testified at trial that he was an impulsive person and did not intend to kill the victim. The state's expert testified that the defendant was legally sane now but he could not render an opinion about the defendant's mental state during the killing. The state's expert also testified that an expert could not determine a defendant's mental state so long after the fact. Defendant claims that the state's expert's testimony was irrelevant. The expert's testimony raised questions about the accuracy of the defense expert's diagnosis. While the testimony regarding defendant's sanity may have been irrelevant, it was not prejudicial.

Defendant claims he is entitled to a new trial because of jury misconduct. One juror had a newspaper containing a report of the defendant's attempt at a guilty plea. The newspaper was also present in the jury room. On questioning, the juror denied having read the article or any other account of the trial. When a jury has considered extrinsic evidence, the trial court must grant a new trial unless it finds beyond a reasonable doubt that such evidence did not effect the verdict. There was no evidence that the jurors had violated the court's admonition by reading about the case. No abuse of discretion has been shown.

Defendant claims that the jury should have been instructed that a confession should be disregarded if it reasonably may have been the result of a mental condition. The instruction was properly refused because the evidence did not support it. There was nothing to suggest that the defendant acted impulsively when he confessed. A jury may disregard a confession if it was by reason of mental illness, and not the product of a rational intellect done of free will. The purposed instruction here went far beyond such an instruction. The defendant also requested that the jury be instructed not to consider the confession unless it was found beyond a reasonable doubt to be both voluntary and true. This is an incorrect statement of the law. The jury should be instructed to disregard a confession unless it is voluntary. There is no requirement that a jury must also find the confession to be true before considering it. The conviction is affirmed and the case remanded for resentencing.

State v. Green,
144 Ariz. Adv. Rep. 32 (Div. 1, 7/29/93)
Trial Judge David L. Grounds

Defendant was convicted of two counts of sexual assault, aggravated assault, and kidnapping, all dangerous offenses. He was sentenced as a dangerous offender on all of his sentences. Defendant acknowledges that the victim did suffer a serious physical injury as defined by A.R.S. § 13-105. He argues that the infliction of this injury supported only the finding that the aggravated assault was dangerous. Defendant argues that the state was required to establish separate serious injuries connected to the other counts for them to be dangerous offenses. A.R.S. § 13-604.02(A) applies to a person convicted of any felony offense *involving* the intentional or knowing infliction of serious physical injury upon another. "Involving" is an expansive term that connects the injury inflicted to each of the crimes in this case.

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By committing aggravated assault, the defendant was able to accomplish the sexual assault and to restrain the victim in the kidnapping. The trial court could properly consider the serious physical injury as being dangerous so as to enhance all of the sentences.

Defendant was sentenced to life imprisonment on each count. The sexual assault sentences run concurrently to each other, but the aggravated assault and kidnapping sentences are consecutive to each other and to the sexual assault sentences. Defendant argues that the infliction of a single serious physical injury if sufficient to make all four offenses dangerous may not be punished by the imposition of consecutive sentences. The protections of A.R.S. § 13-116 against consecutive sentences does not apply to sentence enhancement. The serious physical injury enhanced the sentence imposed as to each crime but did not define a separate offense. Each of these crimes was established by different acts and each of them was a dangerous nature felony. Consecutive sentences did not violate A.R.S. § 13-116. [Represented on appeal by Stephen R. Collins, MCPD.]

State v. Sandoval,
144 Ariz. Adv. Rep. 37 (Div. 1, 7/29/93)
Trial Judge Lawrence O. Anderson

Defendant was charged with two counts of indecent exposure by exposing his genitals in the presence of two minor females. At a change of plea hearing, the factual basis was that two girls observed the defendant urinating in the park. When the defendant saw the victims, he removed his pants and began yelling and chasing the girls. The girls were frightened and contacted the police. The trial judge found no proper factual basis. The trial judge granted a motion to dismiss, finding that something more than mere nudity is required to violate the statute.

A person commits indecent exposure by exposing their genitals when another person is present and the defendant is reckless about whether such other person as a reasonable person would be offended or alarmed by the act. Defendant contends that there must also be something of a sexual nature to his actions for a violation of the statute. The indecent exposure statute does not include any mention of an act of a sexual nature. The additional requirement of sex offender registration for violation of this statute also does not require that an act of a sexual nature be involved. The dismissal of the charges is reversed. [Represented on appeal by Helene Abrams, MCPD].

Carpenter v. Superior Court,
144 Ariz. Adv. Rep. 40 (Div. 1, 7/29/93)
Trial Judge Lawrence O. Anderson

Defendant's counsel requested a subpoena duces tecum to obtain police records during pretrial discovery. The police agency moved to quash the subpoena. The trial judge granted the motion to quash. The defendant sought special action relief. Rule 15 of the Arizona Rules of Criminal Procedure provides defendants with adequate means to discover material evidence. Under Rule 15, the court may order any person to make available needed information or material. A law enforcement agency investigating a criminal action operates as an arm of the prosecution and falls within the required disclosure provisions. The appropriate discovery method is to make requests pursuant to Rule 15 and have the prosecution obtain the requested material.

Defendant contends that this subpoena was part of an independent pretrial investigation not controlled by the formal discovery process. The Arizona Rules of Criminal Procedure do not limit the right of a criminal defendant to conduct an independent pretrial investigation. However, when a defendant attempts to use the court's subpoena power to order production of materials or information, he must do so pursuant to Rule 15. The trial court's granting the motion to quash is affirmed. The trial court's earlier order precluding subpoenas to any third party was previously vacated. [Represented on petition for special action by Marie Farney and Russell Born, MCPD].

Moss v. Superior Court,
144 Ariz. Adv. Rep. 43

Defendant was stopped and arrested for driving while under the influence. He submitted to replicate breath tests on an Intoxilyzer 5000 machine. This particular device has no second sample collection device. No additional breath sample was captured or preserved or offered to defendant for independent testing. Defendant was advised that he would be given a reasonable opportunity to arrange for an independent test by a qualified professional of his choosing. Defendant did not assert his right to independent testing. Defendant filed a motion to suppress the results of the breath test contending that failure to provide him with a sample for independent testing violated his due process rights. The motion to suppress was denied. Defendant sought special action relief.

Defendant challenges the constitutionality of A.R.S. §§ 28-692(G) and (H) which provide that if the police administer duplicate breath tests and the person is given a reasonable opportunity to arrange for additional test, a sample does not have to be collected or preserved. Defendant contends that the elimination of the requirement that the police capture and preserve an additional sample of a DUI suspect's breath for independent testing deprives him of his due process rights. Due process does not require the state to provide defendants with breath samples, since defendants still have sufficient means of raising a meaningful challenge to the test results through independent testing. The technology of testing devices has progressed to such a degree that built-in safeguards in the machine make an additional sample almost superfluous. Given the sophistication of the Intoxilyzer, chances are extremely low that preserved samples would be exculpatory. Due process does not require the state to provide DUI defendants with a separate additional breath sample for independent testing when replicate tests on an Intoxilyzer 5000 are employed as prescribed by regulation. Defendants may still appropriately challenge the results obtained from a breath sample by means other than a preserved secondary breath sample.

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State v. Plus,
144 Ariz. Adv. Rep. 69 (Div. 2, 7/27/93)
Trial Judge Richard D. Nichols

Defendant was convicted of unlawful transfer of a narcotic drug. He went to an air freight office and handed the clerk a letter. The package was to be sent to Chicago. The clerk was suspicious of the defendant's actions and opened the letter. The package contained heroin.

Defendant claims that the trial court erred in denying his motion for a directed verdict because there was no evidence that the transfer ever took place. Defendant completed the crime when he transferred the package to the clerk. Transfer does not require that the item actually reach the designated person. Further, defendant did all that he could to get the package to its destination. This was a constructive transfer to the party in Chicago and supports the conviction.

Defendant argues that the jury should have been instructed on attempted transfer because the package never reached its destination. The crime did not require the transfer to a named individual but rather a transfer to any individual together with a culpable mental state. A defendant is only entitled to an instruction on offenses that are supported by the evidence. The evidence in this case showed a completed transfer and not an attempt.

On post-conviction relief, defendant claims that he has newly discovered evidence meriting a new trial. The evidence was that the person to whom the package was being sent inquired numerous times regarding its whereabouts. The proffered evidence would not have changed the outcome. The fact that the person to whom the package was addressed was looking for it merely emphasizes that it was expected. This would be true whether the package contained heroin or not. This evidence could also be seen as reinforcing defendant's culpability rather than exculpating him. No abuse of discretion occurred.

State v. Renner,
145 Ariz. Adv. Rep. 50 (Div. 1, 8/12/93)
Trial Judge Maurice Portley

Defendant was charged with two counts of aggravated assault. Defendant entered into a plea agreement where he pled guilty to one count of aggravated assault and stipulated to imprisonment for a class 3 felony. The first trial judge on the case rejected the plea agreement, finding it too harsh. The state withdrew from the plea and the matter was transferred to another judge. The second judge later accepted the same plea agreement and imposed the presumptive term. Defendant claims that the Arizona Constitution prohibits one judge from accepting an agreement that a co-equal judge has already rejected. Article 6, Section 13 of the Arizona Constitution provides "The judgments, decrees, orders, and proceedings of any session of the superior court held by one or more judges shall have the same force and effect as if all judges of the court had presided." The Arizona Constitution does not deprive one judge of jurisdiction from reconsidering a previous ruling. While trial judges are encouraged to avoid reconsideration of another judge's ruling unless warranted by a change of circumstance, a trial judge does not lack jurisdiction to do so and does not violate the Arizona Constitution. Further, Rule 17.4 expressly provides for a change of judge when a plea is rejected. The rule contains no limitation on the second judge's discretion to entertain and independently review any plea that the parties may choose to enter. No error occurred.

Defendant also claims that the second judge erred in sentencing him without first reading the transcript of the mitigation hearing before the first judge. Defendant proceeded before the second judge without asking that judge to order or review the transcript. By failing to object, the defendant waived all but fundamental error. A trial judge must adequately investigate the facts necessary to intelligently exercise his sentencing power. However, the transcript was not available and the file contained much the same information covered in the mitigation hearing. No fundamental error occurred.

Defendant claims his trial lawyer was ineffective for failing to ask the sentencing judge to review the transcript of that prior mitigation hearing. Defendant has failed to show prejudice. He has not pointed to anything specific in the transcript that may have changed the second judge's sentence. No ineffective assistance occurred.

State v. Chavarra,
145 Ariz. Adv. Rep. 61 (Div. 1, 8/19/93)
Trial Judge B. Michael Dann

Defendant was convicted of burglary in the third degree. At trial, the jury was read the Recommended Arizona Jury Instruction (RAJI) on reasonable doubt. The instruction given included the optional language "The term reasonable doubt means doubt based upon reason. This does not mean an imaginary or possible doubt. It is a doubt which may arise in your minds after a careful and impartial consideration of all the evidence or from the lack of evidence." The defendant did not object at trial but now claims that this instruction is fundamentally erroneous because it directs jurors to eliminate possible yet perhaps well-founded doubt from consideration. The RAJI optional definition adds nothing helpful to the phrase and has the affirmative potential to confuse. The illusiveness of the meaning of possible doubt could lead some jurors to misconstrue the concept of reasonable doubt. The instruction has sufficient potential to mislead juries that it should be rejected from further use. However, giving the instruction in this case was harmless error.

(cont. on pg. 9)

The jury separately found that the defendant had previously been convicted of prior felonies. The prosecution introduced a certified copy of a prison "pen pack" into evidence as proof of his prior felonies. These documents were not self-authenticating because they lacked a seal. The state did not call a custodian of records to authenticate the records. The state did call a fingerprint examiner who compared the prints from the pen pack to the defendant's prints and testified they were the same. Defendant claims that there is insufficient satisfactory extrinsic evidence of authenticity to be admissible. Rule 901 permits authentication by evidence sufficient to support a finding that the matter in question is what its proponent claims. Rule 901 is a flexible standard and this standard is satisfied by the evidence presented in this case. [Represented on appeal by Paul Prato, MCPD].

State v. Superior Court [Walker],
145 Ariz. Adv. Rep. 65 (Div. 1, 8/19/93)
Trial Judge Lindsay Ellis

Defendant was charged with aggravated driving while under the influence of intoxicating liquor with two prior DUI's within the preceding 60 months. Prior to trial, the state requested a non-bifurcated trial. The state argued that the prior convictions were elements of aggravated DUI. The trial judge denied the state's motion and the state sought special action relief. The state argues that, under the new statute, the two prior convictions are elements of the offense and not sentence enhancers. Defendant argues that Rule 19.1(B) requires a bifurcated trial and that A.R.S. § 28-697(A)(2) remains a sentence enhancement statute. In *State v. Superior Court [Begody]*, 171 Ariz. 468 (App. 1992) the new statute was found to contain new elements not sentence enhancers. Similarly, the new statute also establishes that the two prior convictions are elements of the offense. A bifurcated trial is not required by Rule 19.1(b).

State v. Rebollosa,
145 Ariz. Adv. Rep. 66 (Div. 1, 8/19/93)
Trial Judge E.G. Noyes, Jr.

Defendant was charged with aggravated driving while under the influence of intoxicating liquor. He was sentenced to the maximum term of 6 years in prison. One of the aggravating sentencing factors was that the defendant was arrested and charged with a new DUI offense while on release from this charge. That new offense had not yet been resolved to a conviction. Defendant claims that it was error to aggravate his sentence based upon an intervening arrest without giving him an opportunity to rebut or explain that arrest. It is well established that prior incidents that do not result in convictions may be used to aggravate a sentence. It is error to aggravate a sentence based upon the mere report of an arrest with no evidence that the defendant probably committed some bad act. However, a different superior court judge had heard the facts of the new arrest. That judge found probable cause that the defendant committed the intervening DUI by revoking his pretrial release. There is nothing improper in the trial court taking judicial notice of an earlier ruling in the same case. Defendant also was afforded the opportunity to explain the intervening arrest at sentencing. No error occurred.

Prior to trial, the parties stipulated that the defendant's license was revoked. This stipulation was read to the jury. Defendant argues that his counsel was ineffective because the trial attorney did not seek to keep the stipulation concerning the license revocation from the jury. Defendant claims that the state's only motive in putting the priors before the jury was to prejudice the defendant. The stipulation addressed an element of the offense. The state has the burden of proving every element of the offense charged. Defense counsel was not ineffective because the stipulation was properly presented to the jury. While the stipulation made it unnecessary for the state to present evidence to prove that fact, it was still necessary for the jury to receive this information to aid them in deciding that element of the offense. Evidence can not be precluded as prejudicial where it is an integral part of the crime charged.

State v. James,
145 Ariz. Adv. Rep. 70 (Div. 2, 8/17/93)
Trial Judge Leslie Miller

Defendant was convicted by a jury of aggravated driving while intoxicated. At the end of the state's case, the defendant made a motion for a directed verdict of acquittal. The trial judge did not deny the motion until after defendant had presented his defense and the jury began its deliberations. Rule 20 motions are intended to be ruled on expeditiously so the defendant is not forced to present his case when the state's case is insufficient. While defendant claims he is prejudiced, he failed to object or to request a timely ruling. Defendant waived the issue on appeal.

After trial, defendant filed a motion for new trial claiming jury misconduct. First, the jury discussed the defendant's failure to testify and this was crucial to their deliberations. The Arizona courts have previously rejected this ground as a basis for a new trial in *State v. Callahan*, 119 Ariz. 217 (App. 1978). Second, the jury applied the wrong standard of proof. The jury disregarded the reasonable doubt standard and decided that if there was a possibility that the defendant was under the influence they would return a guilty verdict to get him off the streets. Juror misunderstanding of instructions is not a ground of misconduct listed in Rule 24. Information concerning how a particular juror viewed the burden of proof relates to the jurors' mental processes and is not grounds for a new trial. Third, the jury committed perjury where they swore to follow the court's instructions including the reasonable doubt instruction, but then convicted him on a lesser standard. This ground also pertains to the jurors' mental process and is not a proper subject for a motion for a new trial. It is also not perjury because jury service does not require a sworn statement within the meaning of the perjury statute. Without condoning the alleged misconduct in question, the trial judge did not error in denying a motion for new trial.

Note: *State v. Bible*, 145 Ariz. Adv. Rep. 3 will appear in the March edition of *"for The Defense."*

January Jury Trials

January 3

Christine Funckes: Client charged with armed robbery and possession of marijuana. Investigator P. Kasieta. Trial before Judge Brown ended January 5 with a hung jury. Prosecutor J. Grimley.

Anna Unterberger: Client charged with sexual assault, burglary and kidnapping. Investigator V. Dew. Trial before Judge Hendrix ended February 10. Client found guilty. Prosecutor D. Macias.

January 4

Dan Carrion: Client charged with DUI. Trial before Judge Jarrett ended January 6 with a hung jury. Prosecutor S. Bartlett.

David Goldberg: Client charged with possession of marijuana for sale and possession of dangerous drugs for sale (with priors). Trial before Judge Gerst ended January 7. Client found guilty (lesser included). Prosecutor D. Schlittner.

James Lachemann: Client charged with resisting arrest (with five priors). Trial before Judge Schneider ended January 5. Client found **not guilty**. Prosecutor D. Patton.

January 5

Peter Claussen: Client charged with aggravated assault. Trial before Judge Schwartz ended January 12 with a hung jury. Prosecutor V. Harris.

Jeremy Mussman: Client charged with aggravated DUI. Trial before Judge Dann ended January 10. Client found guilty. Prosecutor P. Hearn.

January 6

Gary Hochsprung: Client charged with possession of narcotic drugs. Trial before Judge Hertzberg ended January 12 with a hung jury. Prosecutor D. Schumacher.

Vonda Wilkins: Client charged with sexual assault, burglary, kidnapping, and abuse of a vulnerable adult. Investigator D. Moller. Trial before Judge Portley ended January 19. Client found guilty on all counts. Prosecutor R. Campos.

January 10

Dennis Farrell: Client charged with 6 counts of child molestation. Trial before Judge Anderson ended January 27. Client found **not guilty** on 4 counts and guilty on 2 counts. Prosecutor Beatty.

Darius Nickerson: Client charged with aggravated assault (dangerous). Investigator H. Jackson. Trial before Judge Seidel ended January 18. Client found guilty. Prosecutor L. Krabbe.

Jeanne Steiner: Client charged with 2 counts of aggravated DUI. Trial before Judge Brown ended January 13. Client found **not guilty** on one count and guilty on one count. Prosecutor T. Doran.

January 11

James Cleary: Client charged with armed robbery. Trial before Judge Dougherty ended January 19. Client found guilty. Prosecutor L. Stalzer.

Genii Rogers: Client charged with aggravated DUI. Investigator H. Brown. Trial before Judge Hertzberg ended January 18. Client found guilty. Prosecutor S. Bartlett.

January 12

Gary Bevilacqua: Client charged with possession of narcotic drugs (with prior). Trial before Judge DeLeon ended January 14. Client found **not guilty**. Prosecutor P. Sullivan.

Dan Carrion (advisory counsel): Client charged with 1 count of criminal trespass and 1 count of forgery (with priors). Trial before Judge Bolton ended January 14. Client found guilty on both counts (hung jury on priors). Prosecutor T. Duax.

Ray Vaca: Client charged with possession of marijuana (with 2 priors, while on parole). Trial before Judge Grounds ended January 18 with a hung jury. Prosecutor J. Martinez.

January 13

Vicki Lopez: Client charged with theft. Investigator J. Allard. Trial before Judge Dann ended January 19th. Client found guilty. Prosecutor T. Mason.

Stephen Whelihan: Client charged with possession of dangerous drugs. Trial before Judge Martin ended January 19. Client found guilty. Prosecutor J. Davis.

January 18

Tom Kibler: Client charged with forgery. Trial before Judge D'Angelo ended January 19. Client found guilty. Prosecutor V. Harris.

James Lachemann: Client charged with aggravated DUI. Trial before Judge Gerst ended January 19 with a hung jury. Prosecutor P. Hearn.

Steve Rempe: Client charged with armed robbery. Trial before Judge Hotham ended January 21. Client found **not guilty**. Prosecutor T. Clarke.

(cont. on pg. 11)

Roland Steinle: Client charged with three counts of fraud and three counts of theft. Investigator G. Beatty. Trial before Judge McVey ended January 28. Client found **not guilty** of 2 counts of fraud, **not guilty** on one count of theft, guilty on 2 counts of theft, and guilty on one count of fraud. Prosecutor D. McIlroy.

January 19

Doug Harmon: Client charged with three counts of sexual conduct with a minor and one count of child molestation. Trial before Judge Sheldon ended January 21 with a hung jury. Prosecutor D. Macias.

Paul Ramos: Client charged with aggravated DUI. Investigator T. Thomas. Trial before Judge Grounds ended January 20. Client found guilty. Prosecutor T. Tejera.

John Taradash: Client charged with possession of narcotic drugs. Trial before Judge Hilliard ended January 24. Client found guilty. Prosecutor R. Wakefield.

January 20

James Wilson: Client charged with possession of narcotic drug for sale (with priors). Trial before Judge Seidel ended January 25 with a hung jury. Prosecutor M. Armijo.

January 24

Timothy Agan: Client charged with burglary. Investigator B. Abernethy. Trial before Judge Ryan ended January 25. Client found guilty. Prosecutor J. Grimley.

Doug Gerlach: Client charged with possession of dangerous drugs (with prior). Trial before Judge Grounds ended January 26. Client found guilty. Prosecutor M. Vincent.

Daniel Sheperd: Client charged with trafficking in stolen property and theft. Investigator B. Abernethy. Trial before Judge Howe ended January 26. Client found guilty. Prosecutor L. Kane.

January 26

Barbara Spencer and Larry Grant: Client charged with aggravated DUI. Trial before Judge Bolton ended February 1. Client found guilty. Prosecutor M. Ainley.

Scott Wolfram: Client charged with possession of narcotic drugs, possession/production of marijuana, and misconduct involving weapons. Trial before Judge Ryan ended January 27. Client found guilty. Prosecutor D. Schumacher.

January 31

Daniel Sheperd: Client charged with forgery. Trial before Judge Chornenky ended February 1. Client found guilty. Prosecutor R. Walecki.

SUPERIOR COURT ROTATION AND ASSIGNMENTS INTO AUGUST, 1994

Between now and the end of August, 1994, rotation assignments will be as follows:

Department Assignments

Presently --

Judge Hauser is taking Judge Cole's CR calendar
Judge Araneta is taking Judge Hauser's DR calendar
Judge Cole will go to Special Assignment

March 14 --

Judge Baca will assume a Civil calendar
Judge Cole will take SA/CR calendar because of funding demands

June 8, 9, and 10 - the time of Annual Judicial Conference --

Judge Martin from Criminal to Domestic Relations
Judge Galati from Criminal to Civil
Judge Schneider from Criminal to Domestic Relations
Judge Dougherty from Criminal to Special Assignment
Judge Mangum from Domestic Relations to Criminal
Judge Rogers from Domestic Relations to Criminal
Judge Arellano from Domestic Relations to Civil
Judge Araneta from Domestic Relations to Civil
Judge Wilkinson from Civil to Criminal
Judge Yarnell from Civil to Domestic Relations
Judge O'Toole from Civil to Criminal
Judge Hall from Special Assignment to Domestic Relations

July 1 or shortly thereafter --

Judge Silverman from Domestic Relations to Special Assignment
Judge Cole from SA/CR to Domestic Relations

August Calendar Switches at Southeast:

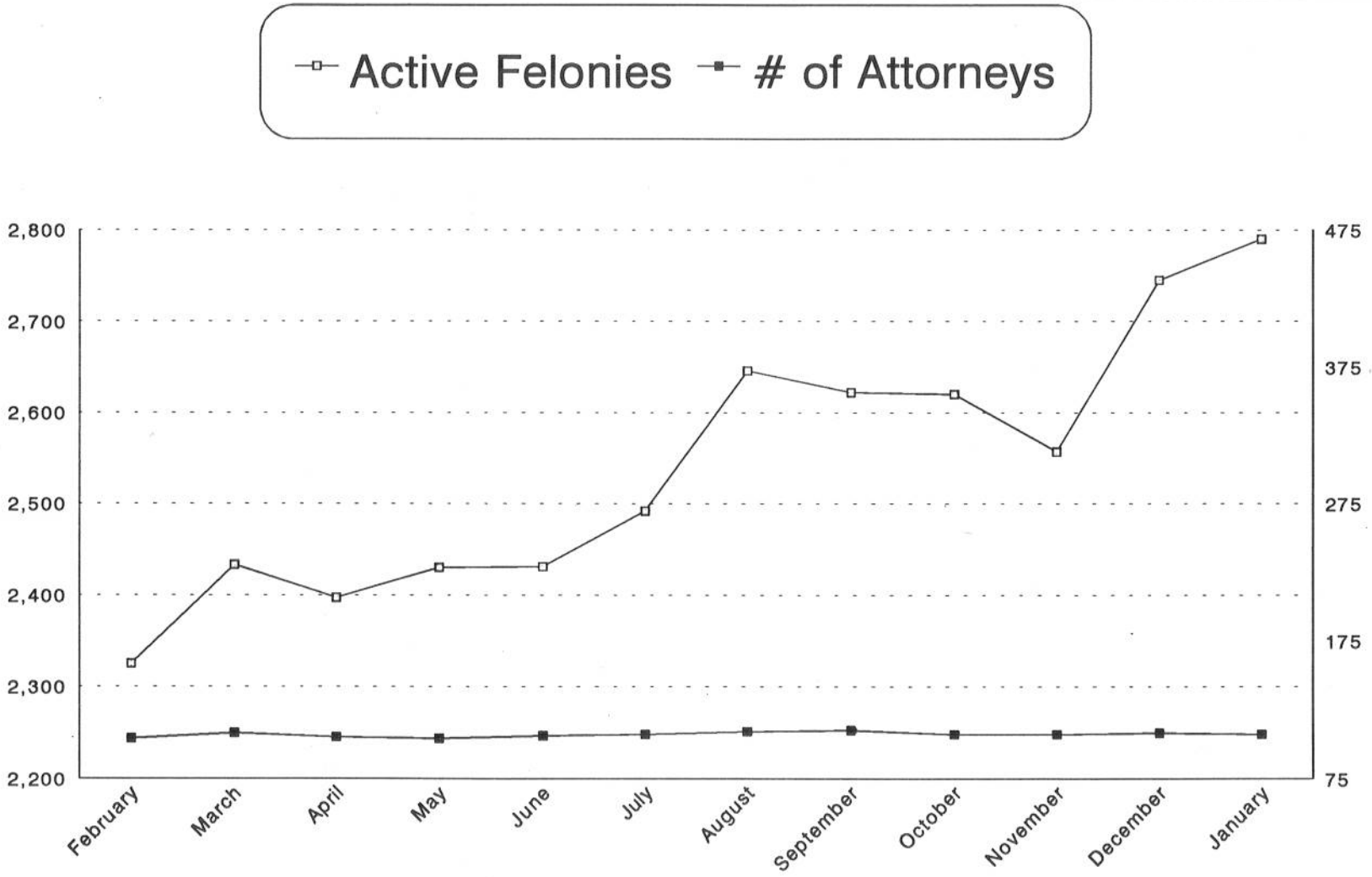
Judge Sheldon to Civil
Judge Roberts to Civil
Judge Kaufman to Criminal
Judge Jarrett to Criminal

TRAINING AT A GLANCE

DATE	TIME	TITLE	LOCATION
Wed., March 02	9:30 a.m. - 11:00 a.m.	*"Ergonomics in a Law Office"*	MCPD Training Facility
Wed.-Fri. March 16-18	8:30 a.m. - 5:00 p.m.	*MCPD Trial Advocacy College (Limited Enrollment Available)*	ASU College of Law
Fri., March 25	10:00 a.m. - 11:00 a.m.	*"F.A.R.E. Probation & The Sentencing Continuum"*	MCPD Training Facility
Wed., April 20	9:00 a.m. - 5:00 p.m.	*"2nd Annual Criminal Investigators Seminar"*	MCPD Training Facility
Fri., May 13	(To Be Announced)	*Fourth Amendment Seminar "If It Wasn't For Bad Luck, I'd Have No Luck At All"*	Board of Supervisors Aud.
Fri., June 03	1:00 p.m. - 5:00 p.m.	*Ethics Seminar*	Board of Supervisors Aud.

MARICOPA COUNTY PUBLIC DEFENDER

Active Felony Caseloads

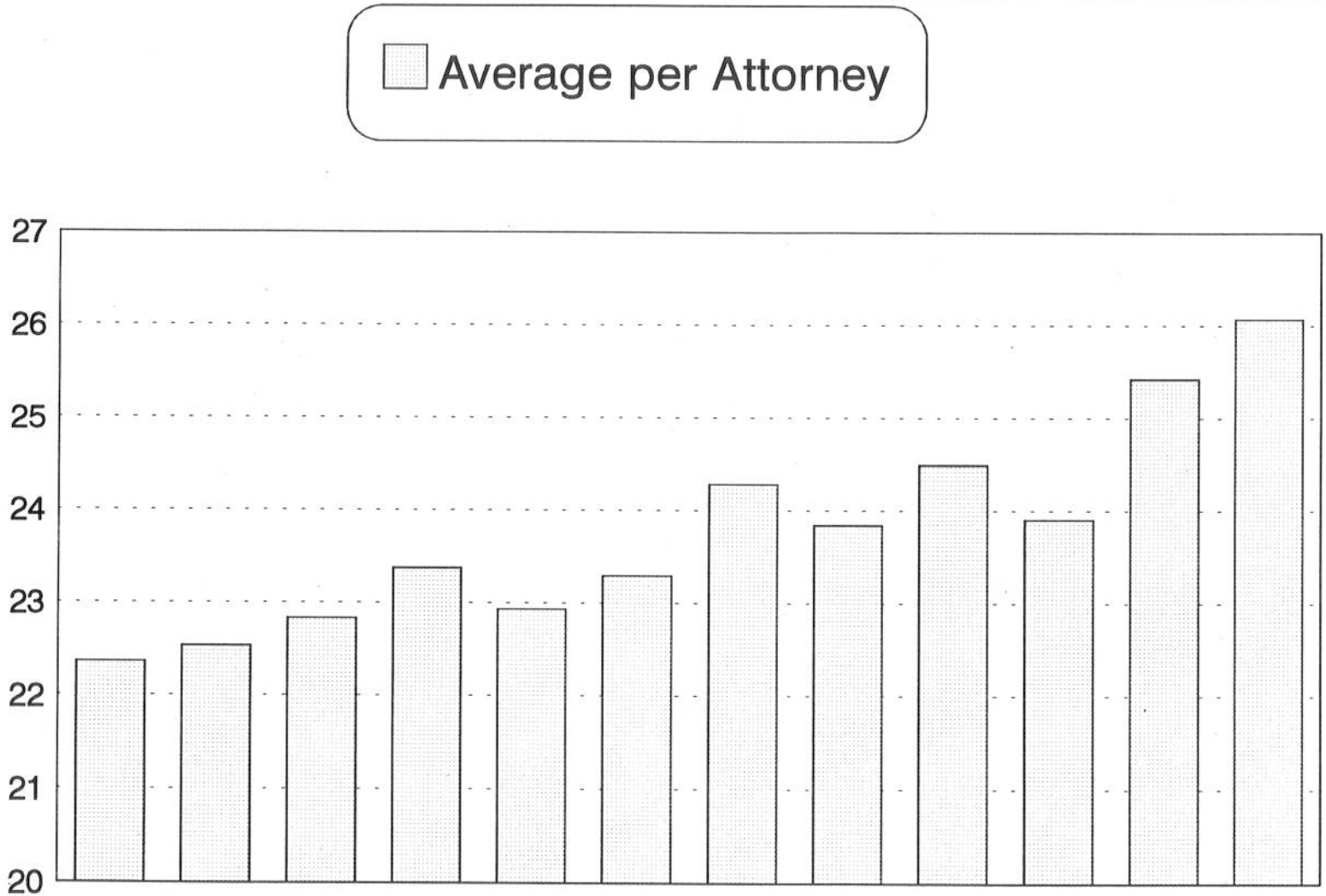


Active Felonies	2,325	2,433	2,397	2,430	2,431	2,492	2,646	2,622	2,620	2,557	2,745	2,790
# of Attorneys	104	108	105	104	106	107	109	110	107	107	108	107

February 1993 - January 1994

Maricopa County Public Defender

Average Monthly Active Felony Caseloads

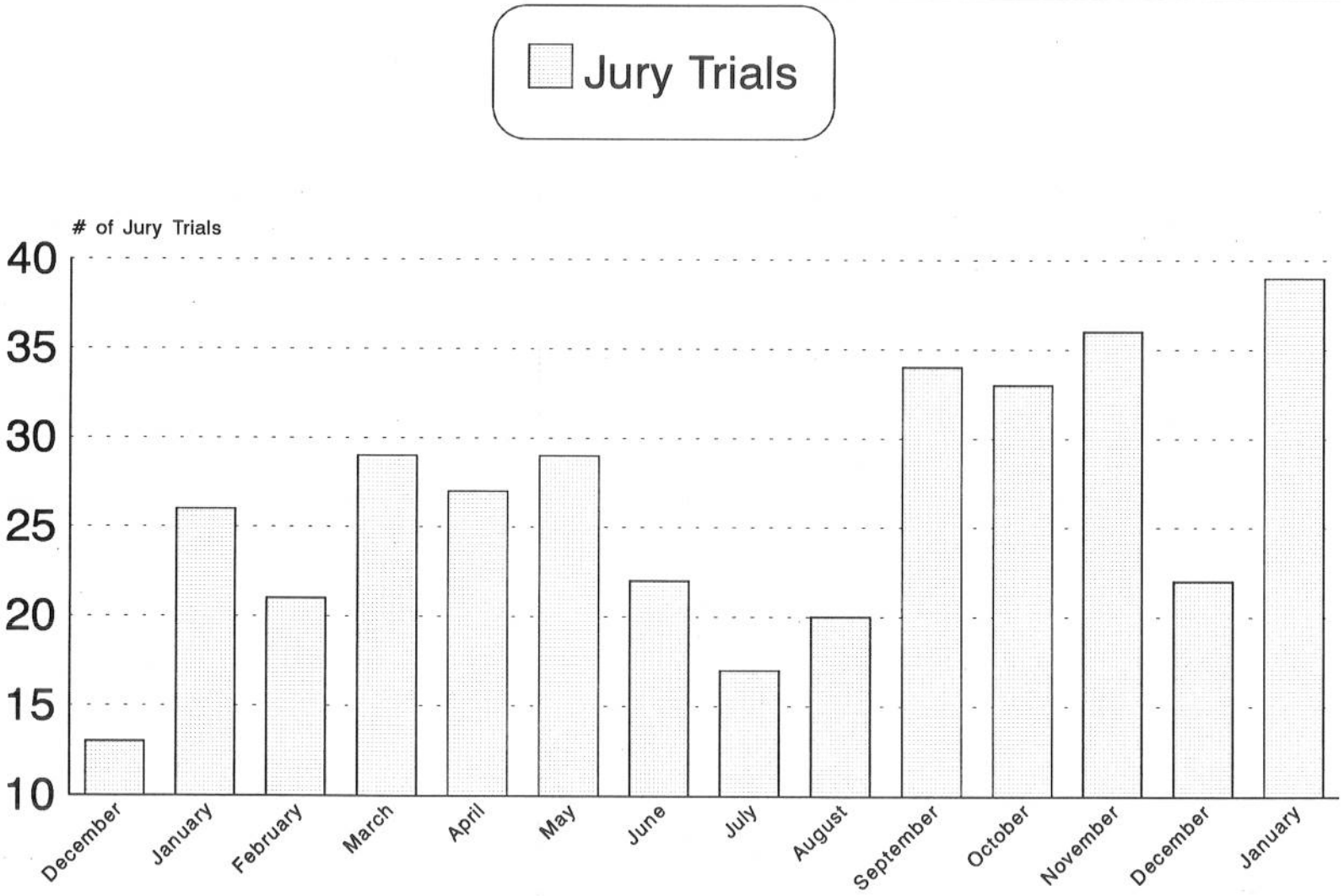


	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan
Average per Attorney	22.36	22.53	22.83	23.37	22.93	23.29	24.28	23.84	24.49	23.9	25.42	26.07

February 1993 - January 1994

Maricopa County Public Defender

JURY TRIALS



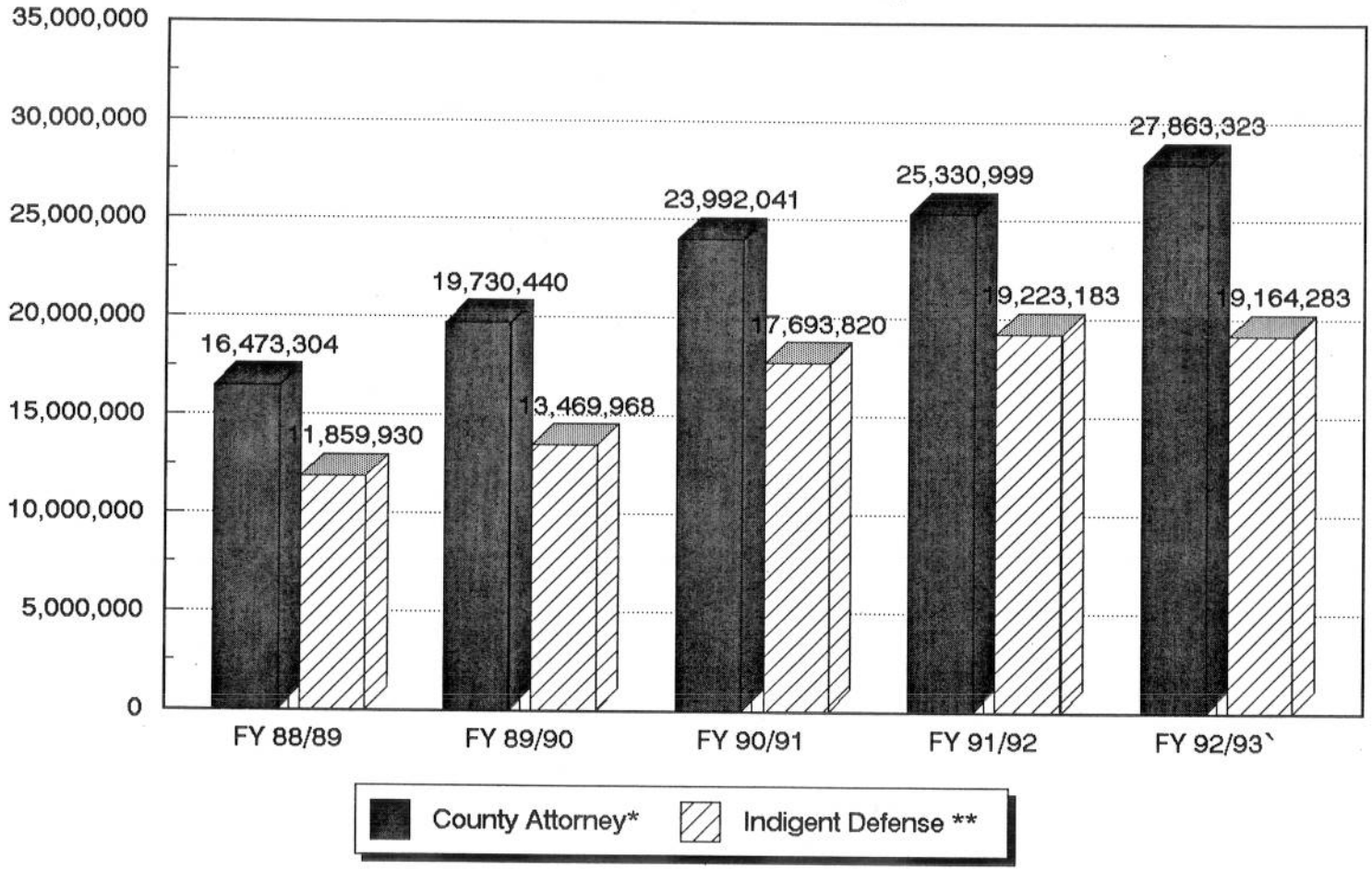
Jury Trials	13	26	21	29	27	29	22	17	20	34	33	36	22	39

December 1992 - January 1994

Indigent Defense/County Attorney Expenditures

Fy 88/89 thru 92/93

(Revised 8/19/93 as to FY 91/92)



*Since Civil Division is unrelated to Indigent Defense operations, its cost are not included.

**Since Appeals, Dependency, and Mental Health costs are unrelated to County Attorney Criminal operations, those costs are not included.

FOR THE DEFENSE FEBRUARY INDEX*

Number of states that have automated at least some records in either the criminal history file or the master name index file: 48
Number of states that have fully automated criminal history files and master name indexes: 15
Names of states that have no automated criminal history files: Maine, New Mexico, Vermont and West Virginia
The average number of days between a final court disposition and receipt of that information by the state criminal history repositories: 43
Number of states reporting that they have backlogs in entering disposition data into the criminal history database: 29
Number of states indicating that they perform records checks of their state criminal history repository in connection with the sale of firearms: 17
Number of pre-sale checks of criminal history information for firearms in the Virgin Islands in 1992: 300
Number of pre-sale checks of criminal history information for firearms in California in 1992: 630,000
Number of subjects that were in state criminal history repositories on December 31, 1992: 47.3 million
Number of arrest fingerprint cards submitted to state criminal history repositories in 1992: 6.2 million
Average percentage of fingerprint cards returned as unacceptable: 13%
Number of states that provide for some form of expungement of felony convictions: 23
Number of states that claim they actually destroy expunged criminal history records: 11
Number of states that maintain the records with action of expungement noted in the file: 10
Only state that subsequently removes the information from its automated database: Florida
Number of states that have a provision for setting aside a felony conviction: 42
Number of states that provide some form of pardon from a felony conviction: 48
Number of states with some provision for the restoration of civil rights of person convicted of a felony: 43
Number of persons in Arizona's automated criminal history files as of 1992: 342,600
Total number of persons in all Arizona criminal records files: 631,000
Number of persons convicted in state courts in 1990 of murder, rape, robbery, drug trafficking, and other felony offenses: 829,000
Percentage of the 829,000 sent to prison: 46%
Percentage of the 829,000 sent to jail: 25%
Percentage of the 829,000 granted probation: 29%
Number of persons convicted of drug trafficking in state courts in 1990: 168,000
Percentage of all felony convictions accounted for by drug traffickers: 20%
Estimated number of drug traffickers sent to state prisons in 1990: 80,000
Number of times the 80,000 drug traffickers increased over 1986: 3
Percentage of convictions for every 100 persons arrested for drug trafficking in 1990: 52
Average sentence of all felons sentenced to state prison in 1990: 6 1/4 years
Average time expected to be served on the above sentence in 1990: 2 years
Percentage of persons nationwide sentenced to life imprisonment after being convicted of murder or non-negligent manslaughter: 22%
Total number of felonies for which the 829,000 felons sentenced in 1990 were convicted: 1 million
Percentage of state felons convicted of 2 felony charges: 16%
Percentage of state felons convicted of 3 or more felony charges: 6%
Percentage of convicted felons on which a fine was imposed: 16%
Percentage of convicted felons on which restitution was ordered: 16%
Percentage of convicted felons on which treatment was ordered: 7%

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*Source: U.S. Department of Justice Bureau of Justice Statistics